Concordia UNIVERSITY

THE GREY AREA

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Editor's Note

This issue of the *Grey Area* deals with administrative law, an area of law that does justice to the name of this bulletin. Administrative law is concerned with the government and public bodies and their organization and functioning. Education law falls under this heading. The issues raised in this context are neither clear nor straightforward and a certain amount of imagination is required to make sense out of the abstract principles advanced.

The purpose of the *Grey Area* is to provide basic information on legal issues of interest. In addition to this quarterly bulletin, the Office of the Legal Counsel will soon begin publishing a bi-monthly, one-page *Higher Education Pamphlet* dealing specifically with the law of higher education.

The next three editions of the Grey Area will deal with Rights and Freedoms, Contracts, and Employment Law respectively. If you have any questions related to these areas which you think would be of interest to the Concordia community, please get in touch with us at the Legal Counsel Office, BC124, local 4854.

Finally I would like to acknowledge the assistance of Bram Freedman, a stagiaire with the Office of the Legal Counsel, and that of my assistant, Alison Kavanagh.

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Private law concerns private relationships. Public law regulates the relationships between individuals, public or quasi-public bodies and government.

The two branches of public law are constitutional law and administrative law. Administrative law is concerned with the government, its organization and its functions. It includes education law.

Among the sources of education law are the laws and regulations adopted by the Québec government. The following is an analysis of those which apply to Québec universities:

An Act Respecting Educational Institutions at the University Level

This Act is intended to put an end to the activities of "so-called" universities in the province which falsely pretend that they offer university-level teaching. To this end, it regulates the use of the word "university" and the issuance of attestations of university studies. It specifies the educational institutions at the university level in Québec. Apart from such institutions, only those institutions which have been granted the power to award degrees by a law enacted by another province or by Parliament and recognized by the Government of Québec as being an institution of higher learning may designate themselves as a "university." This Act further creates offenses relating to the use of the word "university" by an institution not designated as one of higher learning. The Act prohibits these institutions from qualifying a programme or curriculum that it offers or leading the public to believe that the instruction it provides is at the university level.

An Act Respecting the Ministère de l'Enseignement supérieur, de la Science et de la Technologie

This Act outlines the functions and powers of the ministre de l'Enseignement supérieur et de la Science, including those powers related to the financing of universities through operating grants. Some of these powers also concern the adoption of policies and cooperative programmes related to higher education and research.

An Act Respecting the Conseil des universités.

This Act sets out the powers and functions of the *Conseil des universités*. The majority of its members are representatives of the University milieu (at least nine and at most 11 of a possible 17 members).

This is not a regulatory, but rather a recommending body. However, its recommending power should not be underestimated. Thus, the accreditation of any new academic programme by the ministre de l'Enseignement supérieur et de la Science is generally based on the recommendation of the *Conseil des universités*. This accreditation is necessary for the financing of the programme.

Financial Administration Act

This Act establishes the powers and functions of the *Conseil du trésor* of the Québec government. It also regulates the conditions of governmental grants.

Regulation Respecting the Promise and Awarding of Grants. Budget rules, prerequisites to operating grants, are adopted pursuant to a directive approved by the *Conseil du trésor* in application of this regulation. These rules set ceilings for tuition fees and, further, concerns the administration of grants and the disclosure of financial information.

Regulation Respecting the Financial Returns by Establishments Receiving Grants. Unless specifically exempted, this regulation imposes on any establishment or association receiving a government grant the obligation to submit an annual financial report to the *Conseil du trésor*. This report must include an account of revenues and expenditures and a detailed statement of the use made of the grant.

Regulation Respecting Subsidies for Purposes of Construction. Any subsidy of $50,000 or more given by the government for purposes of construction is subject to this regulation. Under the regulation any contract for the execution of a construction project has to be awarded according to a public tender process.

Universities Investment Act

This Act regulates the investment grants given by the Québec government to finance the capital expenditures, equipment expenses and library expenses of universities. According to the Act, universities must submit a five-year investment plan to the ministre de l'Enseignement supérieur et de la Science.

An Act Respecting the Ministère du Conseil exécutif

According to this Act, a university cannot conclude an agreement with the Canadian government or a foreign government, or with one of their ministers or agencies, without the prior approval of the Québec government if the value of the agreement is above $700,000.

Professional Code

This Code regulates access to the practice of recognized professions, the use of professional titles and the practice of recognized professions.

Regulation Determining Which Diplomas Issued by the Designated Teaching Establishments Give Access to Permits or Specialists' Certificates of Professional Corporations. Diplomas listed in this regulation and issued by the University give access to the permits issued by the Québec professional corporations of engineers, chemists, chartered accountants, accredited management accountants, social workers, psychologists, guidance counsellors and chartered administrators.

Code of Civil Procedure

This Act notably codifies and regulates extraordinary administrative recourses such as *mandamus, quo warranto* and evocation. It also regulates the issuance of injunctions.

An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information

The purpose of this Act is to ensure that individuals or organizations, under certain conditions, may have access to documents held by public bodies, while ensuring that nominative information, such as student records and personnel files, will not be disclosed without the consent of the person(s) involved.

An Act Respecting the Accreditation and Financing of Student Organizations

This Act establishes a formal recognition process for students' associations. It also establishes a mechanism for the financing of such organizations.

Québec Charter of Rights and Freedoms

The Charter covers all subject matters under the legislative jurisdiction of Québec. All Québec laws are subject to its authority and regulations. Therefore, the Charter applies to the University's Charter and its by-laws. It prohibits discriminatory provisions in contracts as enumerated under the Charter.

Administrative Law Recourses

MANDAMUS. Issued by the Superior Court, a *mandamus* is "an order commanding a person to perform a duty or an act which is not of a purely private nature." It may be issued if the Court considers that an official of a corporation or a public body omits, refuses or neglects to accomplish an act which it is by law bound to perform or to exercise a duty expressly or implicity imposed by law.

QUO WARRANTO. Issued by the Superior Court, the aim of this recourse is the obtention of the removal of a person occupying or exercising an office illegally in any corporation or non-incorporated association.

EVOCATION. This recourse flows from the exercise by the Superior Court of its superintending and reforming power. The court may cancel a decision rendered by a tribunal subject to its power or prevent the tribunal from rendering a decision. To this date, the Superior Court has refused to qualify a university disciplinary committee as a tribunal subject to its superintending and reforming power.

ACTION IN NULLITY. This action, which flows from the exercise of the superintending and reforming power of the Superior Court, can be used against any Québec corporation. In applying the action, the Court will intervene only if it considers that a decision constitutes an abuse of right, denial of justice, fraud or bad faith. Whether a decision is quasi-judicial, administrative or regulatory will not be considered.

What is an injunction?

An injunction is a special remedy which may be issued by a Superior Court ordering the cessation of an act, or the maintenance of the *status quo*. In certain situations the court may even order the performance of an act. A temporary or interlocutory injunction is usually requested at the beginning of or during a suit and should be granted only where the requesting party can demonstrate that the issuance of an injunction is necessary to prevent an otherwise irreparable injury pending a decision on the merits of the case.

Q: What is natural justice?

A: Natural justice has been described as "fair play in action." Its rules have been traditionally divided into two parts: first, the *audi alteram partem* rule which consists of giving a person affected by a decision a reasonable opportunity to present his or her case; secondly, the *nemo judex in causa sua debet esse* rule, which means the duty of a decision-making body to reach a decision untainted by bias.

Q: What is the content of the *audi alteram partem* rule?

A: Its content varies from situation to situation but its essential component is the necessity "for giving the parties to the controversy a fair opportunity for correcting and contradicting any relevant statement prejudicial to their views."

Q: What are its other components?

A: **A Notice.** The essential elements on which a decision could be based must be communicated in order for the person to make representations and comments on them.

The opportunity to submit a defence. If the procedure does not provide for a formal hearing, an opportunity to correct, contradict or explain statements of evidence prejudicial to the person must be provided.

Access to information. Information necessary for the person to be sufficiently informed about his or her case must be disclosed. However, this rule does not equate to an absolute right to information.

A: **The right to cross-examination.** The *audi alteram partem* rule may include this right if the hearing is held by a tribunal or body which may be qualified as quasi-judicial.

The right to an adjournment. This right exists if an adjournment is necessary for the presentation of the proof and if the party which requests it has not been negligent.

The right to be represented by counsel. Even during a quasi-judicial hearing, this right is not absolute, although recognized in Québec by the *Charter of Rights and Freedoms*.

A public hearing. A person may demand a public hearing; however, a hearing *in camera* (closed-door hearing) *may* be obtained if it is in the public interest.

The reopening of an inquiry. At the request of the person, an inquiry may be reopened at the discretion of the tribunal.

Q: What is the *nemo judex in causa sua debet esse* rule?

A: This rule means that a decision-making body has not only the duty to decide matters without bias but must also avoid situations which might create a possibility of bias, a likelihood of bias, or even a reasonable apprehension of bias. A classical *dictum* expresses it as follows: "...it is not merely of some importance but it is of fundamental importance that justice should not only be done but should manifestly and undoubtedly seem to be done."

Q: What are the situations which may lead one to think that there is a reasonable apprehension of bias so as to disqualify a decision-making body?

A: **Conflict of interest.** When a member has a financial, personal or professional interest, however small, in the subject of inquiry an apprehension of bias may be alleged. Such reasonable apprehension of a bias in one member of a tribunal is sufficient to disqualify the whole tribunal.

To sit on the appeal of your own decision. A person who sits on the appeal of his or her own decision may be inclined to confirm it and therefore a reasonable apprehension of bias exists. However, there are cases where the legislator permits duplication. There are also some instances where the Courts ruled that duplication was proper and would not result in a bias or constitute a breach of natural justice.

A: **To be a party and a judge in the same dispute.** A person who has made himself or herself a party cannot sit or act as a judge in the same dispute. But, there are cases where a tribunal or a body is by statute authorized to act in a dual capacity.

Past or actual behaviour towards a party. Hostility towards one of the parties may raise a reasonable apprehension of bias. In order to do so, this hostility must be sufficiently characterized.

Q: Do the rules of natural justice apply to all decision-making bodies?

A: These rules apply to tribunals or decision-making bodies entrusted with judicial or quasi-judicial functions. However, the Courts have ruled that even in purely administrative decisions a natural justice "duty to act fairly" exists.

Q: What is a quasi-judicial decision?

A: There is no definition of a quasi-judicial decision. The fact that it may affect the rights or legitimate expectations of a person is essential but not sufficient to qualify a decision as quasi-judicial. Other criteria to be considered were identified by the Supreme Court of Canada: the nature of the litigation and its importance; the existence or absence of an adversary procedure; the obligation to apply fixed rules to individual cases instead of a general policy. The more important the sanctions and the matter involved are, the more likely it is that the process will be qualified as quasi-judicial.

Q: What is an administrative decision?

A: This is a decision based on policy and subjective evaluation rather than on fixed, pre-existing and objective standards. This decision is subject to the duty to act fairly, but not all administrative bodies are subject to it although most administrative decisions taken by a university will be covered.

Q: What is the foundation of the duty to act fairly?

A: This duty arises from the same general principles of natural justice as does the duty to act judicially which applies to judicial or quasi-judicial bodies. Its existence will depend on certain factors: the nature of the decision to be made; the relationship existing between the body and the individual; and the effect of that decision on the individual's rights. In general, a decision of a preliminary nature will not be subject to the duty to act fairly, whereas a final decision may be subject to it. A relationship encompassing some factors of a public element will imply this duty. Finally, a decision has to be significant and have an impact on an individual to trigger a duty to act fairly.

Q: What is the content of the duty to act fairly?

A: Its content will vary according to the circumstances of a case. This less onerous duty has been described as "observing the rudiments of natural justice for a limited purpose in the exercise of functions that are not analytically judicial but administrative." Professor D.J. Millan suggested that the proper approach is to see the content of natural justice or procedural fairness gradually but perceptibly diminish the nearer one approaches the administrative end of the decision-making spectrum.

(This article was inspired by Patrice Garant, *Droit administratif, 2e édition 1985,* Les éditions Yvon Blais Inc., Montréal, 1985.)

CASE LAW

Judicial deference to the arbitration process.

The Supreme Court of Canada held that the grievance and arbitration procedures set out by Labour Relations Statutes generally provide the exclusive recourse open to parties to a collective agreement for its enforcement to the exclusion of the Courts. This is the case whether or not the questions at issue might have arisen in the absence of a collective bargaining regime, if the collective agreement binding the parties provides for the matters at issue. It is also the case whether or not the meaning or application of a collective agreement's terms are disputed.

The Supreme Court justified its decision by stating that judicial deference to the arbitration process is present whether the arbitration board is a statutory tribunal or a private tribunal not created by statute. This deference flows from the idea that, were the Courts available as an alternative forum, violence would be done to a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour dispute.

Nevertheless, the Court noted that the power of a Court to prohibit illegal strike activities is not diminished where the grievance and arbitration process can provide no adequate remedy in the circumstances. This power is not to enforce collective agreements *per se* but to enforce the general law embodied in the statute, including an express

prohibition of strikes during the currency of a collective agreement and provision for binding and enforceable arbitration:

(Case discussed: *St. Anne Nackawic Pulp and Paper Company v. Canadian Paper Workers Union*, Local 219, [1986] 1 S.C.R. 704.)

The power of an arbitrator to interpret and apply the Canadian Charter.

The Supreme Court of Canada ruled that an arbitrator, in deciding a grievance under a collective agreement, could apply the *Canadian Charter of Rights and Freedoms.*

Relying on the British Columbia *Labour Code*, the majority of the Supreme Court held that an arbitrator possessed this power. This code empowered an arbitrator to interpret and apply any Act intended to regulate employment.

While recognizing that applying the Charter would further complicate the task confronting an arbitrator, the Court did not accept the contention that the interpretation and application of the Charter is vastly different from the application of ordinary statutes.

It is worth noting that two Justices pointed out that the majority relied heavily on specific provisions in the *Labour Code* as well as in the collective agreement. They preferred to leave open the question whether an arbitrator may have jurisdiction to interpret the Canadian Charter in absence of such specific provisions in the governing legislation or in the collective agreement.

It should be mentioned that this case concerned some provisions of a collective agreement of a community college which has been considered by the Court as being a part of government.

Therefore, the Court ruled that this college was, contrary to universities, subject the the *Canadian Charter of Rights and Freedoms*.

(Case discussed: *Douglas/Qwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570.)

The public nature of universities.

Recently, the Supreme Court of Canada ruled that universities are not part of the government and therefore were not subject to the Canadian Charter.

The *Canadian Charter of Rights and Freedoms* states that it applies only to the legislative, executive and administrative branches of provincial and federal governments.

For the majority of the members of the Court sitting on this case (four judges), a university cannot be considered as a governmental body even if a certain control is exercised by the State in relation to the university's financing or by application of the law. Its management is not subject to governmental rules. A university is an autonomous body and ultimately its expenditures are not controlled by the State.

This majority reaffirmed the traditional autonomy of a university and added that any attempt to intervene in its decision-making process by the State could be the object of strong opposition because it could lead to violations of a university's academic freedom.

However, two judges considered a university as part of government because, in their opinion, it is controlled by the State; its financing is mostly public; its decision-making process is subject to judicial control and some of its programmes require governmental approval (presumably in order to be financed).

Finally, one judge estimated that a university's function, which could be qualified as delegated by the State, could be subject to the Canadian Charter's scrutiny.

Therefore, the Supreme Court of Canada's opinion is not unanimous when it comes to the public nature of universities.

(Cases discussed: *University of British Columbia v. Connell & Harrison; McKinney v. Board of Governors of Guelph University,* C.S.C. n° 20747 & n° 20785, 6 December 1990, by C.J. Dickson, and J.J. Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Cory.)

Did you know that...

A university disciplinary committee is not considered a quasi-judicial tribunal.

To this date, Québec tribunals have refused to see in a university disciplinary committee a quasi-judicial tribunal. Consequently, the right of a person to be represented by counsel before such a tribunal and recognized by the Québec *Charter of Rights and Freedoms* does not apply to a university disciplinary committee. This question will soon be submitted to the Québec Court of Appeal for determination.

Originally, the power to award degrees flowed from the royal prerogative. This power was considered as a franchise, i.e., a privilege or part of a prerogative granted by the Crown to one of its subjects. Indeed, the Crown was defined as the "source of all privileges and honours." Therefore, before the Confederation, some universities were created by Royal Charter (Laval, McGill and Bishop) in order for them to issue degrees. This explains the request, by Bishop College, for a Royal Charter and the fact that its Act of Incorporation provided only, and intentionally, the power to award diplomas. This college did not want its Act disallowed by the Imperial authorities as had been the case for Queen's College whose Act, in 1840, had been disallowed on the ground that it conflicted with the royal prerogative of granting charters. A Royal Charter was issued in 1841, incorporating this institution under the name of Queen's College with "the style and privileges of a University."

In American law, the right to counsel in disciplinary proceedings is limited to legal advice. Indeed, in state universities or colleges, a student has the right to have counsel present at a disciplinary hearing to advise him or her, but only the student is allowed to cross-examine the witnesses. Attorneys act as observers and advisors - not as advocates - in university disciplinary proceedings. The law appears to be moving toward the recognition of students' right to counsel at American private universities. To this date, the Québec courts have not recognized this right.

Concordia was created by the merger of Loyola College and Sir George Williams University. In 1948, by a special Act, Sir George Williams College obtained a university charter. In 1959, this college officially became Sir George Williams University. In 1974, by the merger of this university to Loyola College, Concordia University was created. However, the University still operates under the Charter of Sir George Williams University, the latter's name having been changed by a Special By-Law adopted under the *Special Corporate Powers Act.*

NEXT ISSUE:

Rights & Freedoms

If you have any particular questions regarding Rights and Freedoms, please send them to us at the Legal Counsel Office.

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This Bulletin has been prepared for purposes of general information only. It must in no case be considered as a comprehensive study of the law nor an expression of opinion upon the matters reviewed in it. It would be advisable to consult with the Legal Counsel with respect to any question(s) concerning one's individual circumstances.

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